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SOME CONSIDERATIONS RELATIVE TO THE DETERMINATION OF THE QUESTION WHETHER A BREACH OF A CONDITION IN A CONTRACT GOES TO THE WHOLE CONSIDERATION.

In a recent editorial entitled "Something of Importance Relative to Rescission of Contracts," 62 Cent. L. J. 161, we called attention to the fact that the law is well established that before a party has the right to rescind, the act of the other party must be such as to show an abandonment of the contract, that is to say, that the failure of the other party must be a total one, such as would amount to a rescission of the contract if one party could by himself rescind. The question as to whether there has been such a breach as would amount to a total failure is one of fact to be determined from all the surrounding circumstances, in other words, the acts of the party committing the wrong with respect to which the action was brought, must evince an intention to be no longer bound by the terms of the contract. Freeth v. Burr, L. R. 9 C. P. 208, 30 L. R. A. 33. The courts find the most trouble in determining whether the breaches are such as to defeat some substantial part of the contract under consideration; that is, whether the breach goes to the whole consideration. Just where to draw the lines in many cases is found to be the vexatious problem. If damages may be given for a particular breach the courts have hesitated about saying that such a breach goes to the whole consideration, so as to give the right to recover as for a total failure, and much confusion has resulted. While it is true that each case must be carefully scrutinized and the facts and circumstances thereof must be considered in determining whether the breach is such as to warrant the right to proceed as for a total failure, yet, the courts frequently seem at sea as to what test should be applied, and fall down completely in cases in which it would seem that there should have been but little trouble.

The idea has gotten a strong hold that a condition may be called a condition subsequent and the trouble is at an end; and yet this very condition may have been one upon which the contract depended for its existence. It certainly ought to be no difficult matter to settle, as a question of law, if it is determined that the condition in a contract is one without which the agreement would not have been made. We say that there should be no trouble to determine that such a breach goes to the whole consideration. Often the question first to be determined is not one of law but of fact. In such cases the full purpose of a contract is not disclosed till a view of all the surrounding circumstances of its making are considered and a contract seemingly divisible on its face, in the light of all the surrounding circumstances, may be shown to be an entire contract and the breach of one of the parts may go to the whole consideration. This point is well illustrated in the case of Graves v. Scott, 80 Pa. St. 88. In that case the contract was for the sale of a piece of land, "also a tract of coal property." For the land the vendee "agrees to pay $2,500, $2,000 to be paid on the delivery of the deeds and possession of the property. * * * The coal is to be paid for at the rate of half a cent per bushel, payment to be made for the coal at the end of each year." It was held on its face that this contract would seem to have been divisible. But the vendor being unable upon demand to deliver a deed and possession of the property the vendee did not take possession of the coal land nor mine coal; at the end of the year the vendor sued for $1,000. Held, that the suit being in affirmance of the contract that parol evidence was admissible to show that the land was necessary for the vendee's enjoyment of the coal and that it was the understanding at the execution that the contract was entire. That parol evidence may be admitted to define the position of the parties and the nature and condition of the subject of the contract is too well settled to admit of dispute. The courts have a right to be placed in the position of the parties themselves at the making of the contract, so as to give effect as it was intended at that time. It is therefore safe to say that if a condition in a contract, whether it appears to be subsequent or not, was one without which an agreement would not have been made, the abandonment of such a condition would go to the whole consideration, therefore, give the i

jured party the right to rescind it. In case there has been a deliberate and intentional breach of a provision in a contract, which is such a part of a contract as may require constant observance on the part of the other party and this is plainly the intent of the language of the contract, there ought to be no question about holding it to be an essential element, and that such a breach would go to the whole consideration. That element of the law which is made to prevent wrongs is frequently lost sight of in the application of the rules.

The law should aid the remedy against the wrong-doer and take every reasonable presumption in favor of the party injured and against the party committing the wrong, and this rule should apply with great particularity where there is a willful abandonment of a condition of any importance in a contract, and should apply as well to the terms of a contract as to the measure of damages, where there has been a willful or wanton breach, or in tort where there has been wanton injury. By the application of the rules in this way, the force of the fact that the law is made to prohibit what is wrong, gets its full effect. This element of the law is constantly lost sight of to the great disadvantage of its effectiveness. A willful breach of an important element of a contract, seems to us, should be held in the same light as respects the remedy as though it were a fraud.

NOTES OF IMPORTANT DECISIONS.

BANKRUPTCY—DIVIDENDS ON STOCK AS PROPERTY OF BANKRUPT.—A recent decision of interest to commercial lawyers is that of Bryan v. Sturgis National Bank, 90 S. W. Rep. 704, where the Court of Civil Appeals of Texas holds that neither bank stock owned by a bankrupt's wife acquired by her before marriage, nor any share in the bank's accumulated, but undivided, profits, were "property" within the bankruptcy statute, vesting in the the trustee the title to property which prior to the filing of his petition the bankrupt might by any means have transferred, or which might have been levied on under judicial process against him, and the trustee could not recover dividends declared on the stock after the bankrupt's discharge.

The court in the course of an interesting opinion said: "It is not denied that dividends earned by the separate property of either spouse become community property when such dividends are declared; but such community title nor any other title to the dividends, cannot exist until after such dividends have been brought into existence by a declaration to that effect by the governing body of the corporation. It is not believed that the term 'property,' as used in the bankruptcy statute, was intended to cover every contingent right vested by law in the bankrupt, and which might in the future result in pecuniary benefit to him. For instance, the expectancy of an heir is based upon the right of inheritance; and, under certain circumstances, it may be sold or incumbered by the heir; but will any one contend, or is it reasonable to suppose, that it was the purpose of the statute under consideration to deprive any bankrupt of his right of inheritance and vest that right in the trustee, to be sold and applied to the payment of debts? It is no answer to this illustration to say that the heir cannot transfer his expectancy without the consent of the ancestor, because, while such may be the general rule, there are exceptions to it, one of which is when the ancestor is insane. Hale v. Hollon, 90 Tex. 427, 39 S. W. Rep. 287, 36 L. R. A. 75, 59 Am. St. Rep. 819. The strongest cases cited by appellant are Fisher v. Cushman, 103 Fed. Rep. 860, 43 C. C. A. 381, 51 L. R. A. 292, and *Re* Page, 107 Fed. Rep. 89, 46 C. C. A. 160, 59 L. R. A. 94. In the first case referred to it was held that a liquor license, which is by law transferable to any person satisfactory to a board of police commissioners, is property, within the meaning of the bankruptcy statute, and passes to the trustee for the benefit of creditors. In the second case it was held that a seat in a stock exchange, owned by one who has no unsettled contracts with or claims against him in favor of other members, under which circumstances the rules of exchange permit a sale of the seat, is within the scope of the statute referred to, vests in the trustee, and may be sold for the payment of the debts of the bankrupt.

Those cases are not regarded as analogous, because the license and the seat in the stock exchange were in existence and the bankrupt's had full title thereto at the time when they were declared bankrupts. Also in those cases stress was laid upon the fact that the license and seat in the exchange were purchased with the funds of the bankrupt. In the case at bar the dividends in controversy were not in existence when Boyd was declared a bankrupt, and the bank stock which produced them was not paid for by him, but belonged to his wife prior to their marriage. His title to the dividends results solely from a statute which declares 'that all property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, shall be deemed common property of the husband and wife.' Title derived from such a source cannot antedate the acquisition of the property, and, as the dividends in question were not acquired until after Boyd had been declared a bankrupt, the trustee in bankruptcy was not vested with the title thereto. It is well settled in this state that progeny of fe-

male live stock, the separate property of one spouse, is community property; but it has been held that the levy of an execution against the husband upon cows, the separate property of the wife, did not create a lien upon the calves thereafter born, although the cows were pregnant at the time of the levy. Blum v. Light, 81 Tex. 421, 16 S. W. Rep. 1090. The reason underlying that case has application to this. In both cases it may have been reasonably certain that in the near future there would be such an increase of separate property as, under the statute quoted, would become community property; but, such increase not being in existence at the time of the alleged inception of community title, such title did not then exist."

RAILROAD COMMISSIONS, STATE AND FEDERAL.

When the constitutions, both state and national, provided that the executive power should be vested in the governor or in the president, the judicial in the courts and the legislative in the national congress[1] or in the legislatures of the respective states, they, except in the extraordinary case of impeachment,[2] forbade the union in the same person or persons of any two of the powers enumerated.[3] They did not mean that the separate departments were to have no agency in or control over the acts of each other.[4] But they did mean that the whole power of one department should not be exercised by the same hands which possessed the whole power of another department. They concurred with the Baron de Montesquieu when he said, "when the legislative and executive powers are united in the same person or body there can be no liberty, because apprehensions may arise lest the same monarch or senate shall enact tyrannical laws, to execute them in a tyrannical manner. Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator; were it joined to the executive power the judge might behave with all the violence of an oppressor."[5] When, too, the constitutions provided that the legislative power should be vested in the legislature or in the congress they certainly did not intend that the bodies mentioned should delegate the powers granted to them.[6] It is indeed a well established principle of the law of agency and representation, both public and private, that there is no implied authority to delegate powers which are discretionary in their nature or which involve a personal trust or the exercise of wisdom and judgment.[7] Even in the case of municipal corporations, except where purely corporate matters, local administration, and those exercises of internal police power which are so necessary to self preservation as to verge upon the right of self-defense are involved,[8] the rule has been generally laid down that the legislature must in all cases establish the public policy and the basis at least of the criminal code, and can delegate to the municipality the power alone to pass ordinances or to adopt

[1] United States Const. Art. II., Sec. 1; United States Const. Art. III., Sec. 1; Art. I, Sec. 1.

[2] United States Const. Art. II., Sec. 4; Art. III., Sec. 2.

[3] Montesquieu, Spirit of Laws (Nugent's Trans.), Book XI., ch. 6.

[4] With the exception of the vesting of appellate jurisdiction in the House of Lords, our system of checks and balances is practically that of the British constitution. "On the slightest view of the British constitution, we must perceive, that the legislative, executive and judiciary departments, are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him; can be removed by him on the address of the two houses of parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department, forms also a great constitutional council to the executive chief, as, on the other hand, it is the sole depository of the judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases." The Federalist, No. 47.

[5] The Federalist, Nos. 47, 48, 51; Montesquieu, Spirit of Laws (Nugent's Trans.), Book XI., ch. VI.; State v. Barker (Iowa), 89 N. W. Rep. 204, 208.

[6] "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom or patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." Cooley Con. Lim. 163.

[7] Mechem on Agency, Secs. 184, 190.

[8] De Tocqueville, Democracy in America, Ch. 5; People v. Hurlbut, 24 Mich. 49.

rules for the better carrying out of that policy.[9]

The distinction between a judicial and a legislative act is that one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions. To compare the claims of parties with the law of the land already established is in its nature a judicial act. To pass new rules for the regulation of new controversies is in its nature a legislative act. The difference between the departments is that the legislature makes, the executive executes and the judiciary construes the law.[10] The power to inquire and decide whether or not the rates which have been charged and collected by a railway company are reasonable, is a judicial act. The power to prescribe the rates which shall be charged in the future is a legislative act.[11] The executive power has been defined to be "that power in the government which causes the laws to be executed and obeyed."[12] And although from time to time congress has increased the original powers of the president of the United States by conferring upon him certain administrative powers probably not contemplated by the framers of the constitution, and the delegation of such power has been generally acquiesced in,[13] a distinction has always been recognized between powers which are executive and those which are merely administrative,[14] and it is hardly possible that when the people of the constituent states of the American union provided in the federal constitution that the executive power should be vested in a president, or the people of the several states provided in their local constitutions that the corresponding power should be vested in their governors, that the right to administer was denied to all other persons and bodies.[15] The original grant of power indeed has been generally held to have been, with the one exception of the administrative power of appointment,[16] a political and governmental rather than an administrative power.[17] It was the power in the main which had been usually exercised by the colonial governors.[18] It was in the main the power of the governor of the American state of today, which is becoming more political and less administrative as time goes on.[19] The inevitable conclusion is that executive powers and duties were alone entrusted to the president and denied to congress or entrusted to the governors of the several states and denied to the state legislatures, and that, although as we have seen certain administrative powers have from time to time been conceded to the national executive and to the governors of the several states,[20] the right to exercise such powers or to delegate their performance to other persons or bodies was in the main conferred upon the national congress or retained by the legislatures of the several states.[21]

Of the numerous measures proposed and enacted of recent years which have provided for the appointment of railroad commissions, some have been content with conferring upon the commissioners powers which are merely advisory, investigatory and administrative in their nature. To such there can be but little objection, provided that the powers given are not too inquisitorial and do not offend against the constitutional provisions which forbid unreasonable searches and seizures, or the well known rule of criminal law which allows a person to refuse to give testimony which will serve to incriminate him-

[9] Dillon, Munic. Corp. § 329 (3rd Ed.) The right of an almost complete local sovereignty has, however, been repeatedly claimed. See paper of Mr. Amasa W. Eaton, "The Origin of Municipal Corporation in England and in the United States," in reports of American Bar Association, vol. 25, p. 292; also notes to Newport v. Horton (R. I.), 50 L. R. A. 330.

[10] Cooley Const. Lim. 108; Bates v. Kimball, 2 Chip. 77; Woodbury, J., in Merrill v. Sherburne, 1 N. H. 199; Marshall, C. J., in Wayman v. Southard, 10 Wheat. 46; Brewer, J., in Interstate Com. Comm. v. Cincinnati, etc., Ry. Co., 17 Sup. Ct. Rep. 896, 900.

[11] Brewer, J., in Interstate Com. Comm. v. Cincinnati, etc., Ry. Co., 17 Sup. Ct. Rep. 896, 900.

[12] Bouvier's Law Dict., p. 717.

[13] The power of removal, for instance, was not expressed in the constitution but has been conceded to the president by congress. 1 Lloyd's Debates, 351, 366, 450, 480, 600; Deady, 204; Pom. Const. Law, Secs. 647, 657.

[14] Goodnow Comp. Adm. Law, Vol. 1, p. 62, *et seq.*

[15] United States Const. Art. II., Sec. 1; Williamson v. United States, 1 How. 290, 17 Peters, 144.

[16] See 1 Goodnow Comp. Adm. Law, 63, 64; Pom. Const. Law, Sec. 633.

[17] 1 Goodnow Comp. Adm. Law, 62, 63.

[18] 1 Goodnow Comp. Adm. Law, 62, 63.

[19] Bouvier's Law Dict., Vol. 1, p. 719; Goodnow Comp. Adm. Law, Vol. 1, p. 74.

[20] See note, 13 *ante*.

[21] See Goodnow Comp. Adm. Law, Vol. 1, p. 72.

self.[22] To this class the present federal statute belongs.[23] It is true that in an ill-advised moment the Supreme Court of the United States committed itself so far as to unnecessarily say that "the powers of the present railroad commission appointed by the federal government, and the jurisdiction of which is confined to the interstate status of the railroads are judicial and administrative,"[24] but it did not say, nor was it necessary to say that those functions were properly united, and perhaps too on mature deliberation and when occasion to pass directly upon the question arises, it will hold that the functions are not judicial after all.[25] All that it did hold in the case was that from the language of the statute creating the commission it was clear that congress had not intended to clothe it with any legislative powers, and that the commission, therefore, had no power to prescribe a tariff of rates which should control in the future.[26] Other measures, however, have sought to confer powers which are not only advisory, investigatory and administrative, but executive also; others, powers which are investigatory, advisory, administrative, executive and judicial, and still others, powers which are not only advisory, administrative, investigatory and judicial, but also legislative in their nature. All of these must ultimately be passed upon, if they have not been so already, in the light of the considerations which we have attempted to present at the beginning of this article, and their validity and scope thus determined. From the considerations suggested it seems clear that all the national congress, and, under the majority of the local constitutions, all a state legislature can do in the matter of creating and empowering a railroad commission, is to create a board which shall be investigatory, advisory and administrative in its nature, or a subordinate railroad court which shall possess the functions of a court alone. A choice must be taken and one or the other body decided upon.[27] The power to create a subordinate court is derived from the provision of the federal constitution which vests the judicial power in one supreme court and in such inferior courts as the congress may from time to time ordain and establish.[28] Such a court, however, if created, must be created in accordance with the terms of the constitution. Its judges must hold office during good behavior, be nominated by, and, by and with the consent of the senate, appointed by the president of the United States. Their salaries also may not be diminished during their continuance in office.[29] The court thus created can be entrusted with judicial powers and with judicial powers alone. Powers not in themselves judicial and that are not to be exercised in the discharge of the functions of the judicial department, cannot be conferred on courts or judges designated by the constitution as part of the judicial department of the nation or even of a state.[30] The act itself, it is true, need not always be judicial in character. If the general power be judicial, or if the act itself be in aid of some judicial function, it is sufficient.[31] Courts, for instance, may be authorized to make contracts to keep court rooms in repair;[32] they may appoint commissioners to apportion and assess damages for the opening of a highway;[33] may appoint jury commissioners;[34] may determine whether a municipal corporation shall be created or adjoining territory annexed.[35] But in each and all of these cases the powers are either judicial in character, or are to be exercised in the discharge of functions pertaining to the judicial department.[36] A court cannot

[22] Amend. United States Const. Art. 4; People v. Glennon, 74 N. Y. Supp. 794.

[23] Interstate Com. Comm. v. Cincinnati, etc., Ry. Co., 17 Sup. Ct. Rep. 896.

[24] Interstate Com. Comm. v. Cincinnati, etc., Ry. Co., 17 Sup. Ct. Rep. 896.

[25] See opinion of Harlan, J., in Interstate Com. Comm. v. Brimson, 14 Sup. Ct. Rep. 1125, 1136; Cooley Const. Law, 108; Wayman v. Southard, 10 Wheat. 46.

[26] Interstate Com. Comm. v. Cincinnati, etc., Ry. Co., 17 Sup. Ct. Rep. 896.

[27] See opinion of Deemer, J., in State v. Barker (Iowa), 89 N. W. Rep. 204, 208.

[28] United StatesConst., Art. III, Sec. 1, Art. I, Sec. 8.

[29] United States Const., Art. III, Sec. 1.

[30] Deemer, J., in State v. Barker (Iowa), 89 N. W. Rep. 204, 208; Hayburn's Case, 2 Dall. 409; United States v. Ferriera, 13 How. 52.

[31] Deemer, J., in State v. Barker (Iowa), 89 N. W. Rep. 201, 209; Sawyer v. Dooley (Nev.), 32 Pac. Rep. 437; People v. Simon (Ill.), 52 N. E. Rep. 910.

[32] Commissioners v. Gwyn, 136 Ind. 562, 36 N. E. Rep. 237.

[33] Salem Turnpike & Chelsa Bridge Corporation v. Essex County, 100 Mass. 282; City of Terre Haute v Evansville & T. H. R. Co. (Ind.), 46 N. E. Rep. 77.

[34] State v. Kendle, 52 Ohio St. 346, 39 N. E. Rep. 947.

[35] City of Burlington v. Leebrick, 43 Iowa, 253; Wahoo v. Dickinson, 32 Neb. 426, 36 N. W. Rep. 813.

[36] Deemer, J., in State v. Barker (Iowa), 89 N. W. Rep. 204, 209.

originate. It cannot lay down positive rules for future conduct. It can only pass upon that which is presented to it for determination and adjudication. A case or controversy is necessary to its jurisdiction, Railroad courts therefore can pass upon the reasonableness of rates and charges made and exacted, may enjoin violations of the law and punish offenses against the criminal code, but they cannot themselves create a criminal code, add to the one already existing or prescribe a schedule of rates and charges.[37]

As far as a federal interstate commerce commission is concerned it is clear that the right of congress to act is derived from what is termed the interstate commerce clause of the constitution, and from that alone.[38] This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the constitution. The power indeed over commerce with foreign nations and among the several states is vested in congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. A sound construction of the constitution therefore must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution are constitutional. Congress, too, is not limited in its employment of means to those which are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. Rather it is a settled principle of constitutional law that the government which has the right to do an act and has imposed upon it the duty of performing that act, must according to the dictates of reason, be allowed to select the means The test of the power of congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the constitution.[39] Congress, therefore, has the power to establish an adminstrative body which in turn shall have the power to call witnesses before it, and to require the production of books, documents and papers relating to the subject under investigation,[40] and although the power of punishing for contempt for a failure to respond to such a demand, and to answer questions put to the witnesses can not be vested in a commission, as such a power involves the exercise of a judicial function, nor can such a commission be authorized to call upon the courts to aid in the punishment of such an offense against their (the commission's) dignity,[41] it is perfectly competent however for congress to make the failure to so appear or to so testify an offense, not against the commission but against the United States which the commission or its agents may prosecute in the federal courts.[42] Such a proceeding is a case or controversy within the terms of the constitution.[43] The statute may also provide that in case of a failure to appear and testify, an application may be made to a federal court for an order enjoining such attendance and the giving of proper testimony, and, the order once given, a failure to obey the same may be considered and punished as a contempt of the court issuing the mandate.[44] That congress may not delegate legislative powers appears to be well settled.[45] It is therefore clear that it can neither appoint a commission with the purely discretionary power to fix rates as it sees

[37] Hayburn's Case, 2 Dall. (U. S.)409; United States v. Todd, 13 How. (U. S.) 52; Gordon v. United States, 2 Wall. (U. S.) 561; Interstate Com. Comm. v. Brimson, 154 U. S. 447, 484.

[38] United States Const., Art.I, Sec. 8.

[39] Marshall,C. J., in Gibbons v. Ogden, 9 Wheat. 1, 189, 196, 197; McCulloch v. Maryland, 4 Wheat. 316, 421, 423; Harlan, J., in Interstate Com. Comm. v. Brimson, 154 U. S. 447, 14 Sup. Ct. Rep. 1125, 1131; Sinking Fund Cases, 99 U. S. 700, 718.

[40] Interstate Com. Comm. v. Brimson, 154 U. S. 447.

[41] See opinion of Harlan, J., in Interstate Com. Comm. v. Brimson, 14 Sup. Ct. Rep. 1125, 1136.

[42] See opinion of Harlan, J., in Interstate Com. Comm. v. Brimson, 14 Sup. Ct. Rep. 1125, 1136.

[43] Interstate Com. Comm. v. Brimson, 154 U. S. 447, 14 Sup. Ct. Rep. 1125.

[44] Interstate Com. Comm. v. Brimson, 154 U. S. 447, 14 Sup. Ct. Rep. 1125.

[45] U. S. Const. Art. I, Sec. 1; Cooley Const. Lim., 163 (7th ed.).

fit,[46] nor even to fix, "subject to review by the courts, the maximum rates that would not be unreasonably high and extortionate as against shippers,"[47] that is to say, if a failure to conform to such schedule were also made a criminal offense. It is clear that congress cannot delegate to any inferior body the power to define a crime or to limit the common law right both to charge and to be charged reasonable rates.[48] It is also clear that before a person or corporation can be punished for the violation of a law that law must be so definite and certain that the offender may be able to know when he is and when he is not offending.[49] If, therefore, the rate prescribed by the commission is always subject to review by the courts, and is not final, it lacks the definiteness necessary to a criminal enactment. There can, however, be no doubt of the right of congress to appoint a commission whose powers shall be administrative, investigatory and advisory, and which shall, if it pleases, have the right to report to the public and to the railroads a schedule of rates which it deems reasonable.[50] The schedule of rates thus reported may, in a civil suit to recover damages for the charging of unreasonable rates, be made *prima facie* evidence of that which is reasonable.[51] The commission, in short, may be used as a board of expert witnesses, and its findings made *prima facie* evidence much in the same manner as the findings of the commissioners in a partition suit, or in a special assessment proceeding, are usually made by statute *prima facie* evidence, but *prima facie* evidence merely of the correctness of the partition, of the assessment or of the just distribution. The suit for damages must, however, be based not on the charging of a rate higher than that designated by the commission, but on the charging of an unreasonable rate, and the report of the commission or its schedule of rates be used merely for the purpose of showing what is and what is not reasonable. It would be *prima facie* evidence merely. It would be rebuttable, not conclusive.[52] It is true that it has been maintained by ome writers and judges that, following the analogy of the reciprocity cases,[53] congress and the state legislatures can pass statutes prescribing a certain schedule of rates which shall be applicable to all railroads when coming within certain designated classes, and then leave it to the commissioners to put the statute into operation when it seems expedient to them to do so. This position however is untenable. A distinction must be made between those powers which are administrative and those which are executive.[54] It is, as we have before remarked,[55] hardly possible that when the federal constitution provided that the executive power should be vested in a president, or the people of the several states provided in their local constitutions that the corresponding power should be vested in a governor, that the right to administer was denied to other all persons and bodies. But there is a wide difference between administering a law and executing a law, between administering the constitution and executing the constitution. There is a wide difference between acting under a law and putting a law into operation; between acting under a law and abrogating a law. In the English and American governmental systems the executive is coordinate, the administrative is subordinate.[56] A perusal of the cases will show that a delegation of a certain amount of administrative power has always been conceded to be proper, but that where the delegation of executive powers has been tolerated it has always been a delegation to an executive officer. In the reciprocity cases the power to put the laws into operation or to abrogate them was delegated to the president of the United States, the executive officer designated by the constitution, and not to a subordinate board or official.[57] It is true that there are some cases in the state courts which are quoted as

[46] This congress has not so far attempted to do.

[47] The fact that there may be a review in the courts does not render the act less legislative or less judicial. People v. Chase, 165 Ill. 527, 46 N. E. Rep. 454.

[48] Cooley Const. Lim., 163 (7th ed).

[49] City of Shelbyville v. Cleveland, C. C. & St. L. R. Co. (Ind. Sup.), 44 N. E. Rep. 929; Atkinson v. Goodrich Trans. Co., 60 Wis. 141; Chicago Ry. Co. v. Jones, 149 Ill. 361; Louisville & N. R. Co. v. Comm., 35 S. W. Rep. 129.

[50] Interstate Com. Comm. v. Brimson, 154 U. S. 447.

[51] Chicago, Burlington & Quincy R. Co. v. Jones, 149 Ill. 361.

[52] Chicago, M. & St. P. Ry. Co. v. Minnesota, 10 Sup. Ct. Rep. 462, 134 U. S. 418.

[53] Field v. Clark, 12 Sup. Ct. Rep. 494.

[54] Goodnow's Compr. Adm. Law, Vol. 1, p. 62, *et seq.*

[55] See note 15 *ante*.

[56] The Federalist, No. 47.

[57] Field v. Clark, 12 Sup. Ct. Rep. 494.

holding to a different rule.[58] They are nearly all however cases where the act authorized was the exercise of the right of local home rule in strictly local police matters or in matters of private corporate and property s opposed to political and governmental rights. The acts passed upon were acts authorizing subscriptions to railroad bonds, if the localities so desired, and which left it to the localities to themselves decide whether to subscribe or not.[59] They were local option statutes which gave to the localities the power to refuse to grant licenses for the sale of intoxicating liquors.[60] In such cases the public law was made, the public policy declared by the legislatures. It was made unlawful to sell liquor without a license. It was left to the locality to say whether the license should be granted. The municipal body was not given the power to prescribe a rule of conduct, to create a crime or to put a law into operation.

The same general principles must be applied when the railroad commissions of the several states are considered. In most of the states are to be found constitutional provisions similar to those to be found in that of the United States and which vest the executive power in the governor; the judicial in certain specified courts and in such others as the legislatures may from time to time create, and the legislative in the state legislature. In them, as in the federal constitution, nothing is as a rule definitely said about a union of powers, but back of and beneath the legal structure of every state, as back of that of the United States itself, are the English constitutional traditions which Baron Montesquieu merely repeated and emphasized when he laid down his famous maxims in relation to the separation of the departments of power and which Madison and Hamilton so ably expounded.[61] Many of the state constitutions, however, have no provision for the appointment or creation of any courts other than those expressly enumerated, and in such states a special railroad court would therefore be a constitutional impossibility. It is true that in some of the states the courts have held that it is perfectly competent for the legislative body to delegate to a commission a part of its legislative powers and to give to such commission the power to definitely fix a schedule of rates which shall be operative in the future.[62] These holdings however are justified merely by a quibble on words and the use of the term *quasi*-administrative. The doctrine is laid down that although a legislature may not delegate its strictly legislative powers, it may yet delegate authority to regulate certain matters which in the nature of things require regulation of a *quasi*-administrative character, and which in the nature of things could not be satisfactorily regulated by the legislature alone.[63] It will, the writer believes, be evident to anyone who will scrutinize the opinions in the cases, that the conclusions arrived at are the result of expediency rather than of the application of legal principles. The invention of the term *quasi*-administrative does not help the matter. The determination of the question whether an act is legislative, judicial or administrative does not depend upon the nature of the body entrusted with its doing, but upon the nature of the act itself.[64] When Mr. Justice Woods[65] justified the railroad commission law of Georgia by saying that "the true distinction therefore is between the delegation of the power to make the law, which necessarily involves the discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made," he did not correctly state the statute of Georgia, for the act in question gave to the commission the power to make a law, that is to prescribe a schedule of rates which should be operative in the future and furnish a rule for future conduct, and thus to determine the point at

[58] Railroad Company v. Commissioners, 1 Ohio St. 86; Locke's Appeal, 72 Pa. St. 491.

[59] Railroad Company v. Commissioners, 1 Ohio St. 86.

[60] Locke's Appeal, 72 Pa. St. 491.

[61] Montesquieu, Spirit of Laws (Nugent's Trans.), ook X., ch. 6; The Federalist, Nos. 47, 48, 49, 50, 51.

[62] Georgia R. R. Co. v. Smith, 70 Ga. 694; Tilley v. Railway Co., 4 Woods (C. C.), 427; McWhirter v. Pensacola Ry. Co., 24 Fla. 417, 471; Express Co. v. R. R. Co., 111 N. Car. 463, 472; Chicago, etc., Ry. Co. v. Dey, 35 Fed. Rep. 866.

[63] Georgia R. R. Co. v. Smith, 70 Ga. 694.

[64] People v. Chase, 165 Ill. 527, 46 N. E. Rep. 455.

[65] Tilley v. Railway Company, 4 Woods (C. C.), 427, 466.

which the crime of extortion would begin.[66] So too it is doubtful whether the proposition, even if applicable to the act in question, was sound. Is it a well and established principle that the federal congress or a state legislature, may pass an act and then leave it to the discretion of an administrative officer or body as to whether or not it shall be put into operation? It is true that in a number of cases it has been held that this power can be entrusted to the president of the United States,[67] but the president of the United States is an executive officer.[68] Is not this power of putting a statute into operation or of abrogating its provisions essentially an executive as opposed to an administrative power.[69]

If railroad and other similar commissions there must be, and there is a strong argument for them, is there anything to be gained in the long run by twisting the constitutions state and national beyond all recognition. Is it not time to realize that conditions have radically changed since the adoption of these instruments both in the states and in the nation; that the constitution of the United States was adopted and ratified in an age when there were no railroads, no great combinations of either capital or labor, and no foreign possessions; that in many of the states the constitutions of an agricultural era are being sought to be made over and construed to meet the needs of a manufacturing community. Is there not a demand for constitutional amendments rather than for constitutional misco n structions? Does not each new distortion, each new surrender of basic principle and of irresistible logic, pave the way for still further surrender, make the law less and less certain, and encourage that class of lawyers, now only too common, whose main business seems to be to teach their clients how to violate the basic principles of society and human kinship and by the weapons of delay and obstruction to hinder if not prevent all progress and all reform.

ANDREW ALEXANDER BRUCE.

University of North Dakota.

[66] Georgia R. R. Co. v. Smith, 70 Ga. 694.
[67] Field v. Clark, 12 Sup. Ct. Rep. 494.
[68] U. S. Const. Art. II., Sec. 1.
[69] Bouvier's Law Dict. p. 717.

LIABILITY OF COMMON CARRIER IN UNLOADING CARS AFTER NOTICE.

BECKER v. PENNSYLVANIA R. CO.

New York Supreme Court (App. Div.), Nov. 29, 1905.

After the lapse of a reasonable time for the consignee to remove the goods after he has been given notice of their arrival at their destination, the liability of the common carrier as such ceases, and its liability thereafter, if any, is that of a warehouseman.

A carrier was not negligent in failing to unload semi-perishable evaporated apples after notifying the consignee of their arrival at destination, in the absence of evidence that it knew, or in the exercise of reasonable diligence should have known, that the apples would have been in better condition if unloaded.

MCLENNAN, P. J.: The plaintiffs, who were copartners, delivered three car loads of evaporated apples, containing about 500 boxes each, to the Chesapeake & Ohio Railway Company at Staunton, Va., for shipment to Jersey City, over its railroad and connecting lines, one of which was the railroad of the defendant which extended to said city. One of the cars left Staunton on September 30, another October 1, and the third October 8, 1901. On what dates they were received by the defendant, or at what point on its railroad, does not appear. The cars containing the apples arrived, however, at defendant's pier in Jersey City, the terminal of its railroad, where its yard and tracks are located, as follows: The first car, which left Staunton September 30th, arrived October 3d, the second, shipped October 1st, on October 8th, and the third car, which left Staunton October 8th, reached defendant's pier October 12, 1901; the first and third cars having been in transit four days and the second seven days. Notice of the arrival of each car was immediately given by the defendants to the plaintiffs by mail at Fairport, N. Y., their place of residence, which notices they received in due course. They, however, did not claim or seek to take possession of the property until some time in the month of January following, when they removed it from defendant's pier. On the 16th or 17th of October, 1901, one Jacobson, a witness called by the plaintiffs, for them or by their authority examined the apples in the car which arrived October 3d, the one that left Staunton first, and found that the apples were then damaged, were slightly fermented, had commenced to turn in color, and were heated. Three or four days afterwards he examined the car load which arrived October 8th, and three or four weeks later examined the apples in the last car, and which reached its destination October 12, 1901. The witness testified: "The second car I found the same as the first; all three of them the same way. * * * My examination of the third car showed the condition to be about the same as the other two cars, slightly fermented and off color."

The witness testified, in substance, that when

he made such examinations, he knew that the damaged condition of the fruit was due to the fact that it had been allowed to remain in a closed car during hot weather. Presumably, Jacobson reported the result of his examination to the plaintiffs, for whom or by whose authority he was acting. Yet they made no effort to better the conditions in which the apples were found to be, made no complaint, gave no indication that they were not entirely satisfied with the manner in which their property was being cared for. The apples remained in the cars, those in one car for 10 days, in another for 13 days, and in the third 57 days after their arrival, when they were unloaded onto the pier, each carload forming a separate or distinct pile, and they so remained until some time in January, 1902, when they were received by the plaintiffs, and caused to be removed. There is no evidence tending to show that the apples were not in practically the same condition in January, when they were received by the plaintiffs, as they were when they were examined by the witness Jacobson, except about 100 cases, which were injured by salt water, to which reference will be made. In fact, the samples of the apples taken by Jacobson when making such examinations were the basis of the testimony given by plaintiff's witnesses as to the value of the apples in their damaged condition. In fact, we do not understand that it is claimed by the respondents that the damaged condition of the apples resulted from anything which occurred, or from any conditions which existed, subsequent to their removal from the cars, except as to the 100 cases before mentioned. The evidence also fails to show either that the condition in which Jacobson found the apples was due to the fact that the apples were permitted to remain in the cars a few days after their arrival in Jersey City, or that such damage did not result while the apples were in transit; two of the cars being upon the road four days and one seven days, it appearing that during such period the temperature was practically the same as it was after their arrival in Jersey City. It will be remembered that the apples in each car at the time they were examined, although there were several weeks intervening between the examination of the first and the last car, were all found to be in practically the same condition—one car load no worse and no better than another. It would, therefore, seem to be the merest speculation to say that the condition complained of resulted because the apples were permitted to remain in the cars after arrival in Jersey City, and before they were unloaded upon the pier, rather than during the period the defendant sustained the relation of common carrier.

The defendant was not liable as common carrier to the plaintiffs in this case for the damages sustained by them. In fact, it is practically conceded by the respondents that such liability does not exist. As stated by the referee in an opinion: "They [the plaintiffs] concede that the transportation was perfectly made from Staunton to Jersey City, and that the liability of the defendant as common carrier ceased upon its notifying the plaintiffs of the arrival of the shipments at destination. They seek to recover solely on the liability of the defendant as a warehouseman."

It is well settled, as stated by the learned referee, that after the lapse of a reasonable time for the consignee to remove the goods after he is given notice of their arrival at their destination, the liability of the common carrier as such ceases, and if it is responsible thereafter it is as a warehouseman. Tarbell v. Royal Exch. Shipping Co., 110 N. Y. 170, 17 N. E. Rep. 721, 6 Am. St. Rep. 350.

The common carrier, however, does not necessarily relieve himself from all liability by giving timely notice to the consignee of the arrival of the goods, even although he fails to remove them within a reasonable time. "If the consignee neglect to accept or to receive the goods, the carrier is not thereby justified in abandoning them, or in negligently exposing them to injury. If they are not accepted and received when notice is given of their arrival, he may relieve himself from responsibility by placing the goods in a warehouse for and on account of the consignee; but so long as he has the custody, a duty devolves upon him to take care of the property and preserve it from injury." Schen v. Benedict, 116 N. Y. 510, 22 N. E. Rep. 1073, 15 Am. St. Rep. 426, and cases cited. If the goods had been stolen while in defendant's custody because of its negligence, clearly it would have been liable. Tarbell v. Royal Exch. Shipping Co., *supra*. If the property had been destroyed by fire through defendant's negligence, notwithstanding it owed no duty in respect to them as common carrier, it would likewise have been liable. Draper v. D. & H. C. Co., 118 N. Y. 118, 23 N. E. Rep. 131. Under all the authorities, if, after the defendant had fully discharged its duty as common carrier, it negligently suffered plaintiffs' goods to be damaged or injured, it would be liable. So that the question arises, does the evidence tend to establish negligence on the part of the defendant? What did it do or omit in the premises that would not have been done or omitted by a person of ordinary care and prudence? Was it negligent because it failed to unload the apples from the cars onto the pier within 10, 13, or 57 days after it had notified the plaintiffs of their arrival? There is no evidence tending to show that it was the custom of the defendant, or of any other railroad company, to so unload such goods under like circumstances. It had a right to expect from day to day that the plaintiffs would remove the same, or give instructions respecting them. A provision of the bill of lading which constituted the contract of shipment between the parties provided:

"Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination may be kept in

car, vessel, depot, or place of delivery of the carrier at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges."

With such provision in the contract of shipment, we think the defendant was not negligent in omitting to unload the cars in question. Again, there is no evidence which shows or tends to show that the defendant knew, or in the exercise of reasonable diligence ought to have known, that the apples would have been in better condition if taken from the cars and placed upon the pier. The fact that the goods were evaporated apples, and were semiperishable, in no manner tended to establish the fact. But again, the plaintiffs knew that by the terms of their shipping contract the property "may be kept in the car" at their sole risk after being notified of its arrival, and therefore it must be presumed they knew the apples would be so "kept in the car" unless the defendant was otherwise instructed. No instructions having been given, was the defendant negligent because it failed to store the goods in a manner different than provided?

We conclude that the case is utterly barren of facts which indicate actionable negligence on the part of the defendant. We are also of the opinion that the plaintiffs were guilty of such negligence in the premises as would bar a recovery upon the major part of the claim. They knew the character of the goods shipped, the weather conditions, and all the circumstances, including the provisions of the bill of lading. They were promptly informed of the arrival of the goods at their destination, and yet made no effort to protect them, and did not suggest there was danger of injury in case they were kept in the cars, as the shipping contract provided might be done, and made no complaint as to the manner in which the defendant was caring for the goods, although being fully informed in that regard. Under such circumstances, we think it clear that the negligence of the plaintiffs, their inattention and failure to observe the plain provision of the bill of lading, was quite as potential in bringing about the loss as any acts or omissions of the defendant. "The duty of the consignee to receive his goods is as imperative as the duty of the carrier to deliver." Tarbell v. Royal Exch. Shipping Co., *supra*. There is no force in the suggestion that the defendant, in the exercise of ordinary care and prudence, should have placed the fruit in cold storage to await the pleasure or convenience of the plaintiffs. It had the option to do so, and thus might have relieved itself of all responsibility in the premises. No custom or course of business is shown which would impose such obligation on a common carrier. If a train load of peaches of grapes is delivered to a common carrier for shipment to a consignee in one of our cities or villages, and he is promptly informed of the arrival of such consignment, and he neglects or refuses to receive the same, the carrier is not under the obligation to place the same in cold storage, but may, especially where the contract, as in this case, provides the goods may be kept in the cars, so permit them to remain until called for by the consignee without incurring any liability therefor.

Upon the main controversy in the case, we think the evidence fails to establish a cause of action in plaintiff's favor, first, because the proof does not indicate with any degree of accuracy that the defective condition of the apples did not occur while the defendant sustained the relation of common carrier to the plaintiffs, and without any fault on its part as such; second, because the evidence fails to show negligence on the part of the defendant as warehouseman; and, third, because the evidence clearly shows that the injury sustained by the plaintiffs was the result of their own negligence and inattention, and the failure on their part to observe the plain provision of the bill of lading—the shipping contract.

There is a question of fact presented by the evidence as to the damage done to 100 cases of the apples while on defendant's pier, and which were flooded by salt water. It is claimed that such damage resulted from an unprecedented rise of tide, and such as the defendant could not have reasonably anticipated. Upon the whole evidence, we think the question of defendant's negligence in that regard was one of fact.

It is considered unnecessary to discuss the other questions presented by this appeal. We conclude that the judgment should be reversed, and a new trial granted, with costs to appellant to abide event upon questions of law only.

NOTE.—*Care of Perishable Goods—Notice.*—The principal case is one which relates to a rapidly increasing production of the kind of freight therein involved. While the care and duty required as to semi-perishable goods is correctly stated in the principal case, there are some conditions frequently arising where such perishable goods as strawberries, peaches and the like, require a much higher degree of care and attention on the part of the carrier. If the law has not been settled on this point to the effect that where such perishable freight, as just above mentioned, arrives at destination and carried in refrigerator cars, it should be the duty of the carrier to proceed immediately to note the condition of the ice boxes in the car and see that they are filled to their full capacity, it certainly ought to be the law. In the very nature of the their undertaking in respect to such perishable fruit carriers may not escape such an obligation as suggested by regulations which would fall short of such care as we have suggested in regard to fruit having been shipped under refrigeration and requiring it to maintained. As there might be a complete loss of perishable fruit shipped in refrigerator cars by a few hours' delay, the ordinary course of notifying a consignee of the arrival of such a car ought not to apply to such class of freight; notice should be given at once. The law ought to hold a common carrier to such care in such a case, as, that it should be the duty of the carrier to cause each car to be inspected upon arrival at destination and if the car requires reicing at once the carrier should not wait the

process of notifying the consignee, but should at once proceed to have the car re-iced. Carriers demand a higher price for freight of this character, and therefore should be held to the greatest degree of care, and if a delay should occur, it would be a question for a jury to determine whether the carrier had acted with the promptness the circumstances required and the giving of notice in the ordinary way ought not to excuse the carrier from such an obligation as we have suggested in case of very perishable fruit.

In Hutchinson on Carriers (2nd Ed.), Mecham, sec. 324, it is said, that the conclusion to be drawn from all the cases on this subject, that whenever the situation or condition of the goods, from accident or from any cause, becomes such as to require especial care or attention, the carrier must put himself in the place of the owner, and do for them all that might reasonably be expected of a prudent and careful person, and if necessary it would be his duty to incur any expense in their preservation which their value would justify and which their condition might make necessary. His contract and his obligation is not only to carry the goods, but to carry them safely; and when they become exposed to the danger of deterioration or destruction from their own inherent infirmity or from any cause for which the carrier is not accountable, the law makes it his duty to employ at least a reasonable degree of skill and diligence to preserve them, and if he fail to do so, it will be accounted negligence and he will be liable for the loss, though the actual proximate cause of it may be one for which, but for his negligence, he would be in no wise responsible. Norfolk & W. R. Co. v. Liscomb, 90 Va. 137, 17 S. E. Rep. 809; Penn Co. v. Roy, 102 U. S. 457, 26 L. Ed. 144; Louisville & N. R. Co. v. Dies, 91 Tenn. 177, 18 S. W. Rep. 266. Nor can a carrier excuse itself from liability for failure to ice such cars by saying the cars belonged to some other company which had undertaken to supply suitable cars and to see to it that the same were properly refrigerated. It should know that the goods it had accepted and undertaken to carry were perishable, and that the law imposed upon it to use diligence to guard against loss and to preserve such goods. Merchant's Desp. Trans. Co. v. Comforth, 3 Colo. 280, 25 Am. Rep. 757; Ogdensburg, etc. v. Pratt, 22 Wall. 123; Great Western R. Co. v. Hawkins, 18 Mich. 427. It should inspect the freight accepted and do everything necessary for the protection thereof. Beard v. Illinois C. Ry. Co., 79 Iowa, 518; N. Y., P. & N. R. Co. v. Cromwell, 49 L. R. A. 462.

BOOK REVIEWS.

WHITE ON PERSONAL INJURIES IN MINES.

The Law of Personal Injuries in Mines by Mr. Edward J. White of the Missouri bar, deserves to be welcomed by the profession and will be found to be of great value, particularly in mining districts. Mr. White is an able lawyer and has had many years of practical experience, both for and against the plaintiff and has already written a treatise on the subject, "Mines and Mining Remedies," and is, therefore, well qualified to produce just such a work upon the subject as is needed. This work does not pretend to be a digest. It is a treatise. Therefore, Mr. White has selected the best cases, which in his judgment, are best calculated to illustrate the principle set forth n the text. Knowing Mr. White personally, we are satisfied that he has used excellent judgment throughout the work. "No treatise has heretofore appeared devoted entirely to personal injuries in any particular vocation of life. The object of this work is to treat specifically of personal injuries, from negligence, and injuries charged tc have been due to negligence, received in and about mines and mining property." The text is clear and concise. The author says in the preface: "Mr. Buswell's systematic work on 'Personal Injuries,' Judge Bailey's presentation of the subject in his 'Master's Liability for Injuries to the Servant' and Mr. Labatt's exhaustive treatment of the subject in his recent two volume work on 'Master and Servant,' have all been freely consulted." With Mr. White's personal experience and well known thoroughness in the practice of the law, we do not hesitate to commend it as a most valuable treatise upon the subject, and one which every lawyer in mining districts, or having mining cases in his general practice, should have. It comprehends every subject relating to personal injuries in mines.

This work is most worthily dedicated to the Hon. Richard L. Goode, of the St. Louis Court of Appeals, "as a tribute to his distinguished attainments and evidence of the author's friendship." It is published in one volume of 701 pages by the F. H. Thomas Law Book Company, St. Louis.

BOOKS RECEIVED.

A Treatise on the Law of Municipal Corporations By Howard S. Abbott, of the Minneapolis Bar, Late Special Master in Chancery Union Pacific Railroad Receivership; Master in Chancery U. S. Circuit Court; Lecturer on Public and Private Corporations, and Civil Law, University of Minnesota. In three volumes. St. Paul: Keefe-Davidson Company, 1905. Sheep. Price $18.00. Review will follow.

HUMOR OF THE LAW.

WHY HE COULD NOT GET TWO PARTS OF A BOILER TOGETHER.

A number of years ago at Rockford, Ill., the case of Morgan v. Forest City Furniture Co., was being tried before Judge Eustace. Judge Eustace was a gentleman of the old school, and having sat on the circuit bench for many years, and being naturally of a solemn disposition, the years of judicial responsibility had so permeated his mind that judicial seriousness seemed petrified in his face. The dispute was about a boiler, and incidentally whether the method of repairing cracks, which had appeared in it, was proper to warrant a recovery of part of the purchase price which had been held back because of the cracks. A witness had qualified for the defense as an expert and was of the pompous order. The question was asked how he could draw the holes of the two parts of a boiler together, opposite each other, so a rivit could be put through, he had answered that he could not do it. The next question was: "Will you please state to the jury why?" The answer came with great gusto. "Why, if I was as strong as Methusala I could not draw them together." Attorneys, jurors, and hangers-on joined in an outburst of laughter, and one of the older attorneys remarked "that Judge Eustace smiled for the first time in seventeen years."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ADVERSE POSSESSION — Possession by Widow. — Where a husband in adverse possession of land dies, and the widow continues in possession, her right is not hostile to that of her husband's heirs, without notice that she claims adversely to any right derived through her husband.—Larson v. Anderson, Neb., 104 N. W. Rep. 925.

2. AFFIDAVIT — Contempt Proceedings. — Parties to contempt proceedings in chancery who acquiesced in the taking of affidavits by the county judge could not contend that the judge had no authority to take the affidavits.—Seastream v. New Jersey Exhibition Co., N. J., 61 Atl. Rep. 1041.

3. APPEAL AND ERROR—Change of Theory. — Where the court has submitted a question to the jury on the theory on which both parties have tried the issue, the one against whom the verdict is rendered cannot question on appeal the correctness of the submission. — Carpenter v. City of Lancaster, Pa., 61 Atl. Rep. 1113.

4. APPEAL AND ERROR—Dismissal for Want of Service. —The complaint is not properly before the supreme court for consideration on appeal from a judgment granting a motion to dismiss for want of service.—Sherwood Higgs & Co. v. Sperry & Hutchinson Co., N. Car., 51 S. E. Rep. 1020.

5. APPEAL AND ERROR—Motion to Dismiss.—A motion to dismiss an appeal for failure to file briefs must be determined by the facts existing when the notice of motion was given.—Santa Rosa Bank v. Striening, Cal., 82 Pac. Rep. 551.

6. APPEAL AND ERROR—Signing and Filing Bill of Exceptions.—When a party entitled to a bill of exceptions tenders a proper bill within the time allowed by the court, the duty of signing and filing the same rests with the judge, and the party is entitled to the benefit of his exceptions in the appellate court, although the bill was not filed within the time allowed.—Warner v. Marshall, Ind., 75 N. E. Rep. 582.

7 APPEAL AND ERROR—Sufficiency of Record.—Where, on appeal, appellee filed affidavits to the effect that a certain deposition was taken and read and not copied in the transcript, and they were counter affidavits, the court could not determine the question.—Gabbury v. Coombs, Ky., 89 S. W. Rep. 300.

8. APPEAL AND ERROR—Sufficiency of Record.—Where a transcript contains all the pleadings making up the issues for decision, and all the evidence on those issues, the appeal will not be dismissed for the absence of documents which formed no part of the pleadings.—Richardson v. Johnson, La., 39 So. Rep. 449.

9. ARREST—Bankruptcy.—Justice held to be without authority to permit an officer who arrested defendant to amend his return after the justice's jurisdiction in the case had lapsed.—Gibson v. Holmes, Vt., 62 Atl. Rep. 11.

10. ATTORNEY AND CLIENT—Lien of Attorney.—An attorney's right to a lien on a fund in his hands belonging to his client does not necessarily and of itself prevent an action by the client to recover the fund. — Whinery v. Brown, Ind., 75 N. E. Rep. 605.

11. BAIL—Powers of Clerk of Court.—Courts have inherent power to take bail in a criminal case, but clerks only when conferred by statute.—Territory v. Reynolds, Okla., 82 Pac. Rep. 574.

12. BAIL—Presumption as to Validity.—An appearance bond, approved by the sheriff on the day taken by the deputy clerk of the district court, is presumed to have been approved before the prisoner was released.—Territory v. Sellers, Okla., 82 Pac. Rep. 575.

13. BAIL—Validity of Bail Bond.—A bail bond, void under the statute for want of authority to execute it, cannot be enforced as a common-law bond. — Territory v. Reynolds, Okla., 82 Pac. Rep. 574.

14. BANKRUPTCY—Liquor License.—Money received by a bankrupt's trustee for the transfer of the bankrupt's liquor license and for nomination as an applicant for a new license held not received to the use of one whose principal had furnished money to pay for the license, but was distributable among the bankrupt's creditors.—Tracy v. Ginzberg, Mass., 75 N. E. Rep. 637.

15. BANKRUPTCY—Privilege from Arrest. — Testimony that plaintiff filed his petition in bankruptcy before his arrest on civil process is insufficient to show that plaintiff was privileged from arrest because of the bankruptcy proceedings, where it is not shown when he filed the petition.—Gibson v. Holmes, Vt., 62 Atl. Rep. 11.

16. BENEFIT SOCIETIES—Beneficiaries. — A provision of the constitution or by-laws of a mutual benefit society, limiting the beneficiaries to particular classes of persons, may be waived by the society. — Alfsen v. Crouch, Tenn., 89 S. W. Rep. 329.

17. BILLS AND NOTES—Liability of Indorser.—A payee and indorser of certain notes surrendered to the maker and by it delivered to a stockholder to secure advances held not liable to the holder as an indorser.—Bradley v. Bush, Cal., 82 Pac. Rep. 560.

18. BILLS AND NOTES—Recovery of Attorney's Fees.—A purchaser, electing to pay for the land sought to be recovered by the vendor in trespass to try title, held required to pay the attorney's fees stipulated for in the purchase-money notes.—Moore v. Brown, Tex., 89 S. W. Rep. 310.

19. BONDS—Bail.—A bail bond which is void under the statute for want of authority to execute cannot be en-

forced as a common law obligation.—Territory v. Woodring, Okla., 82 Pac. Rep. 572.

20. BOUNDARIES—Location.—Where the first two corners of a boundary could not be located, but the third and fourth could be, it was permissible for the surveyor to reverse the calls from the fourth and run back so as to ascertain the place of beginning.—Lindsay v. Austin, N. Car., 51 S. E. Rep. 990.

21. BUILDING AND LOAN ASSOCIATION—Status of Certificate Holder.—A certificate of stock in a building and loan association held to constitute the holder a stockholder and not a creditor.—Harrison v. Fleischman, N. J., 61 Atl. Rep. 1025.

22 CARRIERS—Damages for Loss of Freight.—Where pictures are shipped in a box marked "glass," the carrier is not required to inquire into the nature and value of the contents of the box.—Bottum v. Charleston & W. C. Ry. Co., S. Car., 51 S. E. Rep. 985.

23. CARRIERS—Injury to Alighting Passenger.—A railroad company held liable for the failure of its conductor to exercise reasonable care in assisting a passenger to alight where no assistance was necessary.—Moody v. Boston & M. R. R., Mass., 75 N. E. Rep. 631.

24. CHAMPERTY AND MAINTENANCE—Contingent Contract.—A contract between an attorney and client by which the former was to receive a contingent fee, the size of which was dependent on the amount recovered, is not champertous nor void for maintenance.—Whinery v. Brown, Ind., 75 N. E. Rep. 605.

25. CHARITIES—Cy Pres Doctrine.—A deed conveying certain property to a religious society in trust for the purpose of public worship is enforceable either exactly or approximately, under the doctrine of *cy pres*.—MacKenzie v. Trustees of Presbytery of Jersey City, N. J., 61 Atl. Rep. 1027.

26. CHARITIES—Free Public Library.—A gift of funds for the erection of a building to be used for a free public library and for industrial education held a valid charitable use.—Board of Trustees of School for Industrial Education v. City of Hoboken, N. J., 62 Atl. Rep. 1.

27. COMMERCE—Corporate Privilege Tax.—An annual license tax, imposed on the business of a foreign corporation engaged in interstate commerce, is not a tax on interstate commerce.—American Smelting & Refining Co. v. People, Colo., 82 Pac. Rep. 581.

28. COMMERCE—Interference by State.—A proportional state tax on the intangible property within the state of a bridge company owning a bridge over a river between the state and another state, levied under Sess. Acts 1898, p. 96, ch. 88, held not a tax on interstate commerce.—Covington & C. Bridge Co. v. City of Covington, Ky., 89 S.W. Rep. 296.

29. CONSTITUTIONAL LAW—Corporation Privilege Tax.—Sess. Laws 1902, p. 73, ch. 3, § 65, imposing an annual state license on the stock of a foreign corporation, does not violate Const. U. S. art. 1, § 10, par. 1, prohibiting laws impairing the obligation of contracts.—American Smelting & Refining Co. v. People, Colo., 82 Pac. Rep. 581.

30. CONSTITUTIONAL LAW—Regulation of Fishing Rights.—Acts Gen. Assem. 1905, pp. 330, 331, ch. 292, §§ 8, 9, authorizing the seizure and destruction of fish nets, set and used in violation of the act, held not unconstitutional as depriving the owner of his property without due process of law.—Daniels v. Homer, N. Car., 51 S. E. Rep. 992.

31. CONSTITUTIONAL LAW—Retroactive Statute.—Acts 1902, p. 44, No. 35, providing that on the death of a judge of the supreme court any judge of that court may allow or amend exceptions in the case tried by the deceased judge, held to apply to causes pending at the date the act became effective.—Johnson v. Smith, Vt., 62 Atl. Rep. 9.

32. CONSTITUTIONAL LAW—Validity of Ordinance Affecting Street Car Fenders.—A city ordinance, requiring street railroads to use a particular automatic fender or some other equally good fender approved by the city council or street committee, held void.—City of Elkhart v. Murray, Ind., 75 N. E. Rep. 593.

33. CONTEMPT—Ignorance of Law.—The fact that one accused of attempting to improperly influence the administration of justice was not an attorney, and possibly ignorant of law, did not purge him of the charge of contempt.—Seastream v. New Jersey Exhibition Co., N. J., 61 Atl. Rep. 1041.

34. CONTRACTS—Offer by Mail.—A valid contract may be entered into by correspondence, and if an offer be made by letter, it is presumed that the writer's intention to contract continues until the time when the contract may be closed by an acceptance.—Warner v. Marshall Ind., 75 N. E. Rep. 582.

35. CORPORATIONS—Reorganization.—A decree relating to the reorganization of a corporation pursuant to an agreement by the bondholders held not subject to reversal on the objection of one bondholder, unless it violates his rights.—Mills v. Potter, Mass., 75 N. E. Rep. 627.

36. CORPORATIONS—Right of Stockholder to Sue.—A corporation having wrongfully refused to sue promoters to recover secret profits on demand of stockholders, the latter can sue, joining the corporation as a defendant.—Groel v. United Electric Co., N. J., 61 Atl. Rep. 1061.

37. CORPORATIONS—Service of Process.—Traveling auditor of foreign corporation held not a local agent within Code, § 217, authorizing service of summons on the local agent of a corporation.—Sherwood Higgs & Co. v. Sperry & Hutchinson Co., N. Car., 51 S. E. Rep. 1020.

38. CORPORATIONS—Taxation.—That only a portion of the capital of a corporation is employed in the state does not relieve it from the payment of an annual license tax on its business, based on its capital stock.—American Smelting & Refining Co. v. People, Colo., 82 Pac. Rep. 531.

39. COURTS—Federal Questions.—Judgment of state court denying right of possession of real property under title founded on an act of congress held to involve no federal question.—Corkran Oil & Development Co. v. Arnaudet, U. S. S. C., 26 Sup. Ct. Rep. 41.

40. CRIMINAL EVIDENCE—Medical Books.—That part of a question asked of a medical expert in a prosecution for homicide was read from a medical book by the district attorney did not constitute error.—People v. Bowers, Cal., 82 Pac. Rep. 553.

41. CRIMINAL LAW—Homicide.—Rev. St. § 792, denouncing four crimes connected with the disjunctive "or," creates four separate and distinct crimes, the first being "assault by willfully shooting at."—State v. Fairbanks, La., 39 So. Rep. 443.

42. CRIMINAL LAW—Service of Jury List.—That Christian names of two of the jurors on the jury list are given by initials only is an irregularity insufficient to set aside a verdict.—State v. Duperier, La., 39 So. Rep. 455.

43. CRIMINAL TRIAL—Newly Discovered Evidence.—The record in a criminal case should show that on the hearing of a motion for a new trial on the ground of newly discovered evidence the affidavits in support thereof were offered or read by defendant.—People v. Fitzgerald, Cal., 82 Pac. Rep. 555.

44. CRIMINAL TRIAL—Reasonable Doubt.—Reasonable doubt is such a doubt as would be entertained by reasonable, fairminded, and conscientious men under all the circumstances.—State v. Brown, Dela., 61 Atl. Rep. 1077.

45. CRIMINAL TRIAL—Self-Defense.—When, in a trial for murder, evidence has been introduced tending to prove that the defendant acted in self-defense, it is incumbent upon the state to prove beyond a reasonable doubt that he did not so act.—Turley v. State, Neb., 104 N. W. Rep. 934.

46. DAMAGES—Eminent Domain.—The acceptance of a commission's report refusing to allow damages for the taking of land by a metropolitan water board held not to deprive petitioner of the right to a trial by jury.—Carville v. Commonwealth, Mass., 75 N. E. Rep. 689.

47. DEEDS—Description.—Vagueness in description in a deed held not material if it identifies the land when taken in connection with plats referred to.—Chesapeake B each Ry. Co. v. Washington, P. & C. R. Co., U. S. S C., 26 Sup. Ct. Rep. 25.

48. DISMISSAL AND NONSUIT—Findings of Court.—The court in entering a judgment of dismissal for want of service should find the facts on which its action is based. —Sherwood Higgs & Co. v. Sperry & Hutchinson Co., N. Car., 51 S. E. Rep. 1020.

49. ELECTRICITY — Contract to Deliver. — A plaintiff held entitled to recover for breach of a contract to deliver electricity under a complaint charging breach of a contract for the sale and delivery of "personal property" (Civ. Code, §§ 654, 655, 663).—Terrace Water Co. v. San Antonio Light & Power Co., Cal , 82 Pac. Rep. 562.

50. ELECTRICITY—Live Wire in Street.—Whether a pedestrian was negligent in attempting to cross a street at a place other than the regular crossing is for the jury, in an action for injuries caused by a live electric wire.— Miller v. Lewistown Electric Light, Heat & Power Co., Pa., 62 Atl. Rep. 82.

51. EMINENT DOMAIN — Establishment of Railroad Crossing.— Proceedings to condemn land for a railroad having been brought in the circuit court, the property owner could not maintain a bill to determine the location of crossings which the railroad was bound to construct.—E. R. & R I. Dixon v. Louisville & N. R. Co., Tenn., 89 S. W. Rep. 322.

52. EQUITY—Pollution of Water Course.—In a suit to restrain a city from polluting a water course, allegations in a cross bill that the acts of certain water companies contributed to the nuisance held not germane to the bill. —Doremus v. City of Paterson, N. J., 62 Atl. Rep. 8.

53. ESTOPPEL—Adverse Possession.—Where one willfully causes another to believe in the existence of a certain state of things, and to act on such belief, the former is concluded from averring a different state of things.—Larson v. Anderson, Neb., 104 N. W. Rep. 925.

54. ESTOPPEL—Damages on Opening Street.—Deed calling for street as a boundary which has not yet been opened held not to estop owner from collecting damages on subsequent opening.—Neely v. City of Philadelphia, Pa., 61 Atl. Rep. 1096.

55. EVIDENCE—Construction of Contract.—It is always competent, except to the extent that the statute of frauds enters into the question, to apply words of general description to the subject matter by evidence of the situation and circumstances of the parties.—Warner v. Marshall, Ind., 75 N. E. Rep. 582.

56. EVIDENCE—Principal and Agent.—The acts and declarations of a third person are not evidence against a party, unless such third person is first shown to be the agent of the party.—Jackson v. American Telephone & Telegraph Co., N. Car., 51 S. E. Rep. 1015.

57. EXCEPTIONS, BILL OF — Amendment. — A party, though entitled to amend a bill of exceptions so as to more accurately state an exception taken, held not entitled to add an additional exception by emendment.— Currier v. Williams, Mass., 75 N. E. Rep. 618.

58. EXECUTORS AND ADMINISTRATORS—Transfer of Assets by Widow.—As against minor children and creditors, the surviving widow has no right to transfer property to one creditor of her deceased husband's estate.—Latham v. Dawson, Tex., 89 S. W. Rep. 315.

59. FALSE IMPRISONMENT—Authority of Attorney.—An attorney's action in directing the commitment of his client's debtor to the wrong prison held chargeable to the client, and to render the client a trespasser, (V. S. 1701, 1703).—Gibson v. Holmes, Vt., 62 Atl. Rep. 11.

60. FALSE IMPRISONMENT—Punitive Damages.—Punitive damages may be allowed for a wrongful arrest, made solely in order to put plaintiff temporarily out of the way, so as to prevent his resistance to an entry on his land.—Jackson v. American Telephone & Telegraph Co., N. Car., 51 S. E. Rep. 1015.

61. FIRE INSURANCE—Reference to Arbitrators.—Where a referee, nominated by the insurer to adjust loss, refuses to co-operate with his associate, it is a waiver by the insurer of its right to have a reference, if it authorizes the action of its referee.—O'Rourke v. German Ins. Co., Minn., 104 N. W. Rep. 900.

62. FIRE INSURANCE—Subrogation of Insurer.—Where an insurer in a fire policy pays the loss, he is subrogated to the rights of the insured against the one responsible for the fire.—Cunningham & Hinshaw v. Seaboard Air Line Ry., N. Car., 51 S. E. Rep. 1029.

63. FISH—Protection.—An order of the fish and game commissioners, prohibiting defendants from discharging sawdust into a river, held a special regulation for the protection of such fish.—Commonwealth v. Sisson, Mass., 75 N. E. Rep. 619.

64. FISH—Rights of Public.—The right to fish in the inland waters of the state, and extending for a marine league out to sea, is absolutely subject to the regulations of the legislature.—Daniels v. Homer, N. Car., 51 S E. Rep. 992.

65. FRAUDS, STATUTE OF—Oral Agreement as to Rent of Premises —An oral agreement to rent premises, beginning on a future date, is unenforceable, under Rev. Laws, ch. 127, § 3, and ch. 74, § 1, cl. 4.—Matthews v. Carlton, Mass., 75 N. E. Rep. 687.

66. FRAUDS, STATUTE OF—Parol Contract of Heirs.—A parol contract by heirs to transfer their interests in certain real estate to the widow, which she fully performed, held not within the statute of frauds.—O'Brien v. Knotts, Ind., 75 N. E. Rep. 594.

67. GUARDIAN AND WARD—Accounting.—An order settling a guardian's final account and discharging him, held not a final adjudication as to the matters not included in the final settlement.—State v. Peterson, Ind., 75 N. E. Rep. 602.

68. HOMICIDE—Malice.—The term "malice" is not restricted to hatred toward the person slain, but includes a general disregard of human life.—State v. Brown, Dela., 61 Atl. Rep. 1077.

69. HOMICIDE—Provocation.—To reduce the crime of murder to manslaughter, the provocation must be so great as to render the person deaf to the voice of reason.—State v. Brown, Dela., 61 Atl. Rep. 1077.

70. HUSBAND AND WIFE—Married Woman's Contract for Services.—A married woman held entitled to bind herself by contract for broker's services in the sale of her property, under Burns' Ann. St. 1901, § 6960.—Isphording v. Wolf, Ind., 75 N. E. Rep. 598.

71. HUSBAND AND WIFE—Title to Realty.—Heirs of deceased wife held not entitled to recover from her husband moneys received by him and used to purchase land for their joint use.—*In re* Kreider's Estate, Pa., 61 Atl. Rep. 1115.

72. INJUNCTION—Restraint of Municipal Officers.—Injunction will not lie to restrain police officers from sending plain clothes men into plaintiff's place of business, and thereby irreparably injuring such business, to detect alleged violations of a city ordinance.—Adams v. Chesapeake Oyster & Fish Co., Colo., 82 Pac. Rep. 528.

73. INJUNCTION—Restrictive Covenants in Deed.—The grantor, in a conveyance of property "for the sole use and behoof of a public park," is entitled to enjoin a violation of the terms of the grant.—Bayard v. Bancroft, Dela., 62 Atl. Rep. 6.

74. INJUNCTION—Threatened Injury.—Plaintiff held entitled to an injunction to restrain defendant municipal corporation from using and threatening to use water belonging to plaintiff.—Turners Falls Fire Dist. v. Millers Falls Water Supply Dist., Mass., 75 N. E. Rep. 630.

75. INNKEEPERS—Loss of Guest's Money.—In the absence of an express contract, a guest held not entitled to enforce an innkeeper's absolute liability for loss of money deposited, unless the relation of innkeeper and guest existed at the time of the loss.—Clark v. Ball, Colo., 82 Pac. Rep. 529.

76. INTOXICATING LIQUORS—Assignability of License.—A liquor license, under Rev. Laws, ch. 100, is not assignable or transferable by the holder.—Tracy v. Ginzberg, Mass., 75 N. E. Rep. 637.

77. JUDGMENT—Assignment.—A written assignment, made pursuant to a previous parol agreement, assigning a judgment, relates back to the time of the agreement.—Brown & Bro. v. Lapp, Ky., 89 S. W. Rep. 304.

78. JUDGMENT—Filing Motion for Judgment.—A motion for judgment for money due on a contract must be filed with the clerk of the court before the commencement of the term at which it is to be heard, so that it may be docketed under Code, 1899, ch. 131, § 1.—Knox v. Horner, W. Va., 51 S. E. Rep. 979.

79. JUDGMENT—Order of Probate Court for Wife's Separate Support.—An order of the probate court on a petition by a wife for separate support held final on the matters alleged in the petition.—Harrington v. Harrington, Mass., 75 N. E. Rep. 632.

80. LANDLORD AND TENANT—Action for Rent.—Act of defendant in moving his goods into plaintiff's tenement and in removing them before the time fixed for the commencement of his tenancy held not to constitute him plaintiff's tenant, nor to affect his rights or liabilities.—Matthews v. Carlton, Mass., 75 N. E. Rep. 637.

81. LARCENY—Obtaining Goods by False Representations Distinguished.—Where one parts with the possession of and title to personalty by means of false representations, knowingly made, the crime is not larceny, but that of obtaining money by false pretenses.—People v. Procter, Cal., 82 Pac. Rep. 551.

82. LICENSES—Discrimination Against Foreign Corporation.—The state in imposing license taxes on corporations may discriminate against foreign corporations and in favor of domestic corporations.—American Smelting & Refining Co. v. People, Colo., 82 Pac. Rep. 581.

83. MANDAMUS—Ability to Perform Duty Demanded.—The peremptory writ of *mandamus* should be issued against persons having the power to perform the duty demanded.—State v. Pan-American Co., Dela., 61 Atl. Rep. 398.

84. MASTER AND SERVANT—Establishment of Relation.—The fact that an assistant foreman was employed directly by defendant's foreman did not render the assistant foreman any the less defendant's servant.—Jackson v. American Telephone & Telegraph Co., N. Car., 51 S. E. Rep. 1015.

85. MECHANICS' LIENS—Claim of Lien.—Counters and partitions erected in a building held properly styled "repairs and alterations" in a mechanic's lien claim.—Mandary v. Smartt, Cal., 82 Pac. Rep. 561.

86. MECHANICS' LIENS—Sufficiency of Verified Account.—To determine the sufficiency of a verified account, filed in support of a mechanics' lien, the account proper and the sworn statement appended to it may be read together and considered as a whole.—Grant v. Cumberland Valley Cement Co., W. Va., 52 S. E. Rep. 36.

87. MINES AND MINERALS—Meteorites, Whether Real or Personal Property.—A meteorite, though not buried in the earth, held real estate, and not personalty, in the absence of proof of severance.—Oregon Iron Co. v. Hughes, Oreg., 81 Pac. Rep. 572.

88. MORTGAGES—Redemption by Creditor.—Where plaintiff filed a notice to redeem from foreclosure sale as a judgment creditor, but his judgment was not docketed until four hours after his notice was filed, his attempt was void.—Brady v. Gilman, Minn., 104 N. W. Rep. 897.

89. MUNICIPAL CORPORATIONS—Assessment for Local Improvement.—In a suit to restrain a city from collecting an assessment for a local improvement in excess of what is admitted to be due, the entry of an unconditional judgment for plaintiff held not error.—Coleman v. Rathbun, Wash., 82 Pac. Rep. 540.

90. MUNICIPAL CORPORATIONS—Damage from Diversion of Use of Park.—Landowner who receives some special tangible damage from the diversion of a public park from the purposes of its dedication is entitled to invoke the intervention of equity.—Bayard v. Bancroft, Dela., 62 Atl. Rep. 6.

91. MUNICIPAL CORPORATIONS—Improvement Ordinance.—Municipal improvement ordinance held not objectionable because it provided that the improvement might be constructed from one of a number of different materials.—*Ex parte* City of Paducah, Ky., 89 S. W. Rep. 302.

92. NEGLIGENCE—Burden of Proof.—Where plaintiff's wheat was destroyed by fire communicated by defendants' threshing engine, negligence would be presumed from the fire, and the burden was on defendant to rebut the same.—Martin v. McCrary, Tenn., 89 S. W. Rep. 324.

93. NEGLIGENCE—Injury to Infant.—Negligence of parents which concurs with that of defendant in causing injury to infant held not to estop a claim by infant's administrator for such injury.—Wilmot v. McPadden, Conn., 61 Atl. Rep. 1069.

94. NEGLIGENCE—Negligent Construction of Bridge.—Where plaintiff was injured by the falling of a bridge by reason of its defective construction, of which the contractor alone had notice, the latter was liable, though the bridge did not fall until after its acceptance.—Casey v. Hoover, Mo., 89 S. W. Rep. 330.

95. NEW TRIAL—Motion in Arrest of Judgment.—A motion in arrest of judgment cuts off the party's right to move for a new trial, except where the grounds for the new trial are unknown to the moving party when the motion in arrest is made.—New Hampshire Fire Ins. Co. v. Wall, Ind., 75 N. E. Rep. 668.

96. NUISANCE—Damages for Personal Injuries.—Plaintiff, having been injured by the explosion of a powder magazine, which was a public nuisance, held entitled to recover damages suffered against the owner, to be followed in the discretion of the court by judgment for abatement.—Flynn v. Butler, Mass., 75 N. E. Rep. 730.

97. NUISANCE—Defectively Constructed Bridge.—Where plaintiff was injured by the fall of a bridge which had been contracted for and constructed under lawful authority, he could not recover on the theory that the bridge by reason of defective construction was a nuisance.—Casey v. Hoover, Mo., 89 S. W. Rep. 330.

98. OFFICERS—Appointment to Elective Office.—The power of appointment to an elective office is exhausted when once exercised, and any subsequent appointment until the incumbent has been removed or the office has become vacant is void.—State v. Vincent, S. Dak., 104 N. W. Rep. 914.

99. PARTITION—Misconduct of Attorney.—Where the attorney who conducted partition proceedings successfully deterred other persons from bidding at the sale, and bought the property for himself for an inadequate consideration, the sale would be set aside.—Mansfield v. Wallace, Ill., 75 N. E. Rep. 682.

100. PARTITION—Purchase by Attorney of Client's Property.—One who knowingly joins with an attorney in purchasing property at a partition sale conducted by the attorney must affirmatively show that the transaction was fair and just.—Mansfield v. Wallace, Ill., 75 N. E. Rep. 682.

101. PARTNERSHIP—Accounting.—Where liquidating partner has made no demand for interest on moneys withdrawn by a copartner none should be allowed on an accounting.—Goodwill v. Heim, Pa., 62 Atl. Rep. 24.

102. PARTNERSHIP—Liability of Firm for Act of Partner.—Where a partner engaged in operating a hotel accepted a deposit of money from a guest and then absconded, plaintiff could recover from the firm.—Clark v. Ball, Colo., 82 Pac. Rep. 529.

103. PARTNERSHIP—Termination of Relation.—Partnership in respect to profits of a transaction can be terminated only by consent, or by an action in equity.—Mitchell v. Tonkin, 95 N. Y. Supp. 669.

104. PLEADING—Error Cured by Judgement.—Defects in a reply held cured by the finding and judgment where the facts stated were sufficient to bar another action for

the same cause.—George v. Robinson, Ind., 75 N. E. Rep. 607.

105. PLEADING—Profert and Oyer.—That a declaration makes profert does not alone make the writing part of the declaration, without a demand of oyer.—Riley v. Yost, W. Va., 52 S. E. Rep. 40.

106. PLEADING—Sufficiency of Complaint.—A complaint which states facts constituting a cause of action is not demurrable because the prayer is for relief which does not conform to the case made.—Erie City Iron Works v. Thomas, U. S. C. C., S. D. N. Y., 139 Fed. Rep. 995.

107. PROCESS—Action for Malicious Abuse of Process.—It is not necessary, in order to entitle a party to maintain an action for malicious abuse of process, that the original proceedings should have terminated.—Jackson v. American Telephone & Telegraph Co., N. Car., 51 S. E. Rep. 1015.

108. PROHIBITION—Disqualification of Judge.—An order made by a judge disqualified to act, awarding a temporary injunction, is only voidable, and its enforcement cannot be prevented by a writ of prohibition.—City of Grafton v. Holt, W. Va., 52 S. E. Rep. 21.

109. RAILROADS—Assumed Risk.—A railroad brakeman whose clothing was caught by the door irons of a passing car, and who was thereby carried to a station platform and crushed between it and the car, assumed the risk.—Chicago, I. & L. Ry. Co. v. Bryan, Ind., 75 N. E. Rep. 678.

110. RAILROADS—Contributory Negligence.—The rule that one who goes on a railroad track immediately in front of a moving train, which he might have seen if he had looked, will be presumed guilty of contributory negligence, applies to clear cases where the facts are free from doubt.—Beach v. Pennsylvania R. Co., Pa., 61 Atl. Rep. 1106.

111. RAILROADS—Effect of Sale Under Foreclosure.—The successor of the Union Pacific Railroad Company, who purchased on foreclosure, did not take the property free from the obligation, under Act Feb. 24, 1871, ch. 67, 16 Stat. 430, enacted after the execution of the mortgage, to permit the joint use of trains by all railroads terminating at Omaha of its bridge, authorized to be constructed by that statute.—Union Pac. R. Co. v. Mason City & Ft. D. R. Co., U. S. S. C., 26 Sup. Ct. Rep. 19.

112. RAILROADS — Presumptions as to Possession of Roadbed.—Possession of railway roadbed will, in ejectment, be presumed to have followed the title until dispossession by defendant.—Chesapeake Beach Ry. Co. v. Washington, P. & C. R. Co., U. S. S. C., 26 Sup. Ct. Rep. 25.

113. RAILROADS—Stop, Look and Listen.—Ordinarily, it is for the jury to say whether an attempt to cross a railroad track without stopping to look or listen is negligence.—Bamberg v. Atlantic Coast Line R. Co., S. Car., 51 S. E. Rep. 988.

114. SALES—Administrator's Sale of Land.—Sale of land for assets, by an administrator, pending an appeal by defendants, in proceedings before the clerk, held not void.—Love v. Love, N. Car., 51 S. E. Rep. 1024.

115. SALES—Breach of Contract.—Where plaintiff contracted for one-half of defendant's tar, its failure to remove the tar or to send tank cars for that purpose during a period of nine months was not a default, in the absence of notice from defendant that there was tar to be removed under the contract.—National Coal Tar Co. v. Malden & Melrose Gaslight Co., Mass., 75 N. E. Rep. 625.

116. SALES—Breach of Warranty.—A warranty that metallic cylinders should "finish sound" held only to mean that when finished they should be free from cracks and air holes, both obvious and hidden.—H. H. Franklin Mfg. Co. v. Lamson & Goodnow Mfg. Co., Mass., 75 N. E. Rep. 624.

117. SALES—Entire Contract.—Where a contract of sale was entire, failure of the seller to ship an essential article authorizes the buyer to refuse to accept the part shipped.—Walter Pratt & Co. v. Frasier & Co., S. Car., 51 S. E. Rep. 983.

118. SEQUESTRATION—Proceeding After Judgment.—Where a suit has been closed by final judgment, no further proceedings could be had except such as might be required for the execution of the judgment.—Martel v. Jennings-Heywood Oil Syndicate, La., 39 So. Rep. 441.

119. SHIPPING—Liability of Assignee of Charter Party.—An assignee of a charter party, having discharged the owners from performance without consent of his assignor, held liable to the latter for the benefits he would have obtained by the performance of the contract.—Frese v. Moore, Cal., 82 Pac. Rep. 542.

120. SPECIFIC PERFORMANCE—Mistake.—That defendant, through an honest mistake not attributable to his own negligence, thought that he was buying more land than the agreement covered, is a defense to a bill for specific performance.—Cawley v. Jean, Mass., 75 N. E. Rep. 614.

121. STATUTES—Custom's Duties.—The words "false" and "falsely," in statutes and contracts which impose forfeitures or penalties, generally imply culpable negligence or wrong.—United States v. Ninety-Nine Diamonds, U. S. C. C. of App., Eighth Circuit, 139 Fed. Rep. 961.

122. STIPULATIONS — Construction of Agreement. — Where it was agreed in writing that a certain copy of a statute of another state should be accepted as a statute of that state, and a certain decision as the law of the other state, the agreement should be given effect as if it had been written into the complaint.—Hall v. Western Union Telegraph Co., N. Car., 52 S. E. Rep. 50.

123. STREET RAILROADS—Burden of Proof in Personal Injury Case.—In an action against a street railroad company for the death of a person struck by a car, plaintiff has the burden of proving that decedent was in the exercise of ordinary care.—Gorham v. Milford, A. & W. St. Ry. Co., Mass., 75 N. E. Rep. 634.

124. STREET RAILROADS — Collision With Wagon. — Teamster, driving in front of rapidly approaching car with intent to compel it to stop, held guilty of negligence *per se*.—Chicago Union Traction Co. v. Jacobson, Ill., 75 N. E. Rep. 508.

125. STREET RAILROADS—Injury to Bicycle Rider.—Bicycle rider struck by street car held guilty of contributory negligence.—Bartlett v. Worcester Consol. St. Ry. Co., Mass., 75 N. E. Rep. 706.

126. STREET RAILROADS — Negligence in Rounding Curve.—In an action for death of a passenger on a street car by being thrown therefrom while it was rounding a curve, the carrier held not guilty of negligence in failing to require a rail along the side of the car to be put down on the outside of curves when the car is rounding the same.—Dolphin v. Worcester Consol. St. Ry. Co., Mass., 75 N. E. Rep. 635.

127. SUBROGATION—Payment of Costs.—A surety who pays the debt must, as a conditon of compelling an assignment by the creditor of a judgment obtained by him against the principal, pay the costs incurred by the creditor in obtaining the judgment.—McKenna v. Corcoran, N. J., 61 Atl. Rep. 1026.

128. SUBROGATION—Payment of Taxes.—Where land on which taxes were assessed to plaintiff was sold on foreclosure subject to the tax, plaintiff, on paying the same was entitled to subrogation as against the purchasers.—Webber Lumber Co. v. Shaw, Mass., 75 N. E. Rep. 640.

129. SUBROGATION—Principal and Surety.—A surety, which assumes the performance of its principal's contract, becomes subrogated to his rights and subject to his liabilities.—Ausplund v. Ætna Indemnity Co., Oreg., 81 Pac. Rep. 577.

130. SUBROGATION—Purchase of Decedent's Land.—Purchaser of land sold to pay decedent's debts, in order to be subrogated to claims of devisee in remainder, must show that such debts existed.—Rice v. Bamberg, S. Car., 51 S. E. Rep. 987.

131. TAXATION—Exemptions.—Exemptions from taxation must be clearly established, or found in the statute, either by express words or necessary implication.—American Smelting & Refining Co. v. People, Colo., 82 Pac. Rep. 531.

132. TAXATION — Fees in Probate Proceedings.—The legislature cannot arbitrarily prescribe the fees of the clerk in probate proceedings, by graduating the same on the basis of the value of the estate probated, regardless of the actual services rendered.—State v. Case, Wash., 8 Pac. Rep. 554.

133. TAXATION—Sale of Land Subject to Tax.—Where land on which taxes had been assessed to plaintiff was sold on mortgage foreclosure subject to the tax, plaintiff could not restrain the collector from collecting the same from him.—Webber Lumber Co. v. Shaw, Mass., 75 N. E. Rep. 640.

134. TAXATION—Statute of Limitations.—Under Ky. St. 1903, § 2524, limitation runs as between the state and a taxpayer until the issuance of process on the statement filed by a revenue agent under section 4241.—Lucas v. Commonwealth, Ky., 89 S. W. Rep. 292.

135. TELEGRAPHS AND TELEPHONES — Damages for Failure to Deliver Message.—In an action against a telegraph company, expenses incurred by plaintiff in taking a certain journey held a proper element of damage.—Hall v. Western Union Telegraph Co., N. Car., 52 S. E. Rep. 50.

136. TELEGRAPHS AND TELEPHONES—Time for Filing Claim for Damages.—Clause of contract for transmission of telegram, requiring claim for damages to be presented within 60 days, held reasonable and valid. — Western Union Telegraph Co. v. Greer, Tenn., 89 S. W. Rep. 327.

137. THEATERS AND SHOWS—Rights of Ticket Holder.—Where plaintiff buys tickets for a performance in a theater, and by mistake his seats are sold to other parties, and he is requested to leave the theater, he cannot recover in trespass for the price of the tickets and the humiliation suffered.—Horney v. Nixon, Pa., 61 Atl. Rep 1088.

138. TIME—Fractions of a Day.—The legal fiction that there are no fractions of a day does not apply where the statute requires notice to be taken of the precise time an official act is done, and a record made.—Brady v. Gilman, Minn., 104 N. W. Rep. 897.

139. TRIAL—Directed Verdict.—A verdict may be directed where the testimony and the inferences therefrom are insufficient to support a different verdict.—McGuire v. Blount, U. S. S. C., 26 Sup. Ct. Rep. 1.

140. TRIAL—Requests to Charge.—It is not proper for the court to refuse a special charge grouping the specific facts on which the party requesting the same relies for a verdict in his favor, because of the giving of a general charge presenting such issues.—Southern Const. Co. v. Hinkle, Tex., 89 S. W. Rep. 309.

141. TRIAL—Scientific Theories Question for Jury.—Where scientific works of well-known authority and opinions of experts are widely at variance on the question whether spontaneous combustion is possible in a certain substance, the courts will not determine as a matter of law which theory is true, but will leave its termination to the jury. — Sun Ins. Office v. Western Woolen Mill Co., Kan., 82 Pac. Rep. 513.

142. TRIAL—Scope of Cross Examination.—A party has no right to cross-examine a witness except as to facts and circumstances connected with matters testified about on his direct examination.— Hampton v. State, Fla., 39 So. Rep. 421.

143. TRUSTS—Mortgage.—The interest of H in land conveyed to W for the benefit of the two held subject to his proportion of a mortgage given by W to redeem the land from execution sale.—Hentig v. Williams, Cal., 82 Pac Rep. 546.

144. TRUSTS—Tracing Funds.—A building and loan association in issuing stock to an individual in her capacity as executrix and other stock to her individually held charged with notice that the first certificate was purchased with trust funds.—Harrison v. Fleischman, N. J., 61 Atl. Rep. 1025.

145. USURY—Defense.—Where a trustee borrows money on behalf of himself and his beneficiaries, he may plead usury as a defense for the benefit of himself and the beneficiaries.—Earle v. Owings, S. Car., 51 S. E. Rep. 980.

146. VENDOR AND PURCHASER — Description of Property Conveyed.—A contract to convey certain land and the building thereon held not to include a bulkhead covering an area leading to the cellar, located on a strip belonging to an adjoining railroad, for such strip.—Cawley v. Jean, Mass., 75 N. E. Rep. 614.

147. VENDOR AND PURCHASER—Liens.—Liens on land contracted to be conveyed which were presently payable out the purchase money held not to render the title, otherwise perfect, unmarketable. — Woodman v. Blue Grass Land Co., Wis., 104 N. W. Rep. 920.

148. VENDOR AND PURCHASER—Mistake and Cancellation of Contract.—Where a contract of purchase was executed under a mistake caused by misrepresentations of defendant's agent, plaintiff held entitled to have it annulled and the purchase money refunded.—Silverman v. Minsky, 95 N. Y. Supp. 661.

149. VENDOR AND PURCHASER—Notice of Mortgage.—Where mortgage securing bond refers to it for conditions, and mortgage alone is recorded, it is no notice to a purchaser of the land of conditions other than those in the mortgage. — Equitable Building & Loan Assn. v. Corley, S. Car., 52 S. E. Rep. 48.

150. WATERS AND WATER COURSES—State Court Decisions.—Decision of state court, that a municipality could not, by contract with a water company, deprive itself of the right to establish reasonable water rates under statute adopted to carry into effect the provisions of the constitution, investing the legislature with power to prevent excessive charges by public corporations, held not so clearly erroneous as to require reversal on writ of error from the Supreme Court of the United States.—Tampa Waterworks Co. v. City of Tampa, U. S. S. C., 26 Sup. Ct. Rep. 23.

151. WILLS—Construction.—A bequest of all testator's "books and papers" held insufficient to convey a bank deposit evidenced by bank books.—*In re* Jeffreys' Estate, Cal., 75 N. E. Rep. 549.

152. WILLS—Election by Widow.—There must be positive evidence that a widow had consented to surrender her legal rights and take under a will. — O'Brien v Knotts, Ind., 75 N. E. Rep. 594.

153. WILLS — Undue Influence. — The existence of friendly relations between a testator and the objects of his bounty does not alone give use to a presumption of undue influence.—Stametz v. Mitchenor, Ind., 75 N. E Rep. 579.

154. WITNESSES— Credibility. — In a prosecution for rape, defendant held not entitled to show, to affect prosecutrix's credibility as a witness, that she was with child never pregnant before, and that since she was 12 years old to the time in question she had had promiscuous sexual intercourse.—State v. Simpson, Vt., 62 Atl. Rep. 14.

155. WITNESSES — Good Character of Defendant. — A witness to the good character of the defendant held not required to answer whether he had not heard that such defendant had "padded his pay roll" and had raped a negro girl.—Coxe v. Singleton, N. Car., 51 S. E. Rep. 1019

156. WITNESSES—Transactions with Deceased.—Guarantor of note, the payee of which had died, held a competent witness in action by executor on the note.—Pattison v. Cobb, Pa., 61 Atl. Rep. 1108.

157. WORK AND LABOR— Presumption of Contract.—Presumption of a contract, implied from proof of the rendition of services, ceases on proof that the services were merely friendly offices rendered by plaintiff to another in time of sickness or distress.—Dallman v. Frank Cal., 82 Pac. Rep. 564.

158. WORK AND LABOR—Quantum Meruit. — Services rendered by an attorney and a detective held illegal because having for their object the procurement of a divorce, and no recovery could be had under a *quantum meruit*.—Barngrover v. Pettigrew, Iowa, 104 N. W. Rep. 904.